



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**

**CIVIL APPEAL NO. 130 OF 2010**

**INDUSTRIAL & COM. DEVT. LTD.....APPELLANT**

**VERSUS**

**MAWA FAMILY COMPANY LTD.....1<sup>ST</sup> RESPONDENT**

**FREDRICK MWAURA KARANJA.....2<sup>ND</sup> RESPONDENT**

**AS CONSOLIDATED WITH CIVIL APPEAL NO. 131 OF 2010**

**BETWEEN**

**FREDRICK MWAURA KARANJA.....APPELLANT VERSUS**

**MAWA FAMILY CO.LTD.....1<sup>ST</sup> RESPONDENT**

**INDUSTRIAL & COMM. DEVT.**

**CORPORATION.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

The 1<sup>st</sup> respondent instituted a claim, by way of a plaint dated 11<sup>th</sup> December, 2008 and filed in court on 11<sup>th</sup> December, 2008 against the appellant seeking for the following prayers:-

***“(a) A declaration that the defendant’s acts of intending to auction the property known as Loc. Maragi/1193/60 Mukuyu market is unjustified and illegal.***

***(b) A permanent injunction do issue restraining the defendant either by itself agents servants employees or any authority or anybody howsoever claiming or acting through it from advertising, auctioning or in any manner transferring to a 3<sup>rd</sup> party the property known as Loc. Maragi/1193/60 Mukuyu Market.***

***(c) Costs of the suit and interest.***

***(d) Any other better relief that this court may find just.***

The plaint was subsequently amended on 22<sup>nd</sup> January, 2009 to include the prayer for specific performance.

The 1<sup>st</sup> respondent's case against the defendant was that on or about the 20<sup>th</sup> December, 2007, it was declared the purchaser in a public auction conducted on the instructions of the appellant for the sale a land parcel known as **Loc. Maragi/1193/60 Mukuyu Market (herein "the suit property")**; as a result of what, in the 1<sup>st</sup> respondent's view, was a successful bid a sale agreement was entered into between the 1<sup>st</sup> respondent and the appellant.

I gather from the 1<sup>st</sup> respondent's plaint that it was one of the terms of the agreement between the parties that the deposit for the purchase of the suit property was payable upon the fall of the hammer and the balance would be paid within a period of thirty days subject to an extension if parties so agreed. The 1<sup>st</sup> respondent avers that indeed parties exercised this option and agreed to extend time for payment of the balance of the purchase price beyond the thirty-day period.

However, so the 1<sup>st</sup> respondent alleged, when it presented the balance of the purchase price, the appellant asked it to bid for the property afresh in a subsequent auction. According to the 1<sup>st</sup> respondent the appellant's actions were unjustified because time was not of essence in the contract executed between the parties.

In its amended statement of defence, the appellant admitted that indeed the 1<sup>st</sup> respondent was declared the highest bidder during the auction of the suit property held on 20<sup>th</sup> December, 2007 and that upon payment of the deposit the balance of the purchase price ought to have been paid within thirty days of the auction; the appellant, however, denied that there was any agreement to extend the completion period.

The appellant also admitted that the 1<sup>st</sup> respondent presented a cheque for the balance of the purchase price outside the limitation period and that it rejected it; it denied that the refusal was in bad faith or in breach of the contract between the parties. In any event, so the defendant averred, the property had been sold in an auction in which the 2<sup>nd</sup> respondent bid for the same property.

The appellant's case was that it is the 1<sup>st</sup> respondent which, in actual fact, breached the contract when it failed to pay the contract sum as and when it was expressly stipulated to be due, time being of essence.

The 2<sup>nd</sup> respondent is said to have purchased the property in the auction that was held on 14<sup>th</sup> November, 2008; it is for this reason that he sought to be joined and was in fact joined to the suit against the appellant as the 2<sup>nd</sup> defendant. He filed a defence and a counter-claim in which he averred that he attended the auction of 14<sup>th</sup> November, 2008 and paid Kshs. 400,000/= for the property which was the highest bid at the auction. The 2<sup>nd</sup> respondent sought for the dismissal of the 1<sup>st</sup> respondent's suit and a declaration that he was the bona fide owner of the property.

In the judgment delivered on 2<sup>nd</sup> July, 2010, the learned magistrate found for the 1<sup>st</sup> respondent and held that it had proved its case; he accordingly entered judgment in its favour and at the same time dismissed the 2<sup>nd</sup> respondent's counter-claim. Being dissatisfied with this decision, the appellant and the 2<sup>nd</sup> respondents appealed on the grounds that:-

1. The learned magistrate had erred in law and in fact in finding that the 1<sup>st</sup> respondent had proved its case beyond reasonable doubt.
2. The learned magistrate erred in law and in fact in holding that the 1<sup>st</sup> respondent was not in breach of the contract and based on the same erroneous misapprehension ordered for specific performance of contract and thereby arrived at a wrong decision.
3. The learned magistrate erred in law and in fact in finding that the appellant had extended time for completion of the contract when in fact there was no such extension of time granted and consequently shifted the burden of proof to the appellant which burden did not exist.

4. The learned magistrate acted under the wrong principles in deciding the issue of specific performance when it was not a fit case to make such an award, taking into consideration there was an alternative remedy of damages particularly considering that the property had been sold to a third party.
5. The learned magistrate erred in law in awarding an order for specific performance against the appellant while ignoring the obligation of the 1<sup>st</sup> respondent to pay the purchase price.
6. The learned magistrate erred in law and fact in failing to consider payment of the full purchase price at the time of completion of sale as condition precedent to granting the order of specific performance.
7. The learned magistrate erred in law and in fact in holding that **Title No. Loc. 11/Maragi/1193/60** (Mukuyu market) was distinct from **Title No. Loc. 11/Maragi/60** (Makuyu market) yet the name of the market was only necessary in the description of the location of the property irrespective of whether it was spelt as “Makuyu” rather than “Mukuyu” and in any event none of the two names formed part of the descriptive parts of the title of the suit property.
8. The learned magistrate erred in law and in fact in declaring the any action by the appellant to auction **Title No. Loc.11/Maragi/1193/60** as illegal, thereby permanently depriving the appellant of its statutory right of sale which is guaranteed under **section 74** of the Registered Land Act, Cap 300, Laws of Kenya.
9. The learned magistrate’s judgment was based on assumptions and opinions not supported by evidence on record.
10. The learned magistrate erred in law in failing to take cognisance of the case law put to him in the submission of the appellant.

On his part, the 2<sup>nd</sup> respondent faulted the learned magistrate’s decision on, amongst other grounds, that the learned magistrate erred in law and in fact in holding that the auction held on 14<sup>th</sup> November, 2008 in which he participated was not in respect of the suit property that he successfully bid for and purchased. He also faulted the learned magistrate’s decision for dismissing his counter-claim on the basis that he could not recall the bid number when the fact that the auction was held was not displaced. The 2<sup>nd</sup> respondent took issue with the learned magistrate’s finding that there was no agreement entered between him and the appellant in respect of the suit property yet there was evidence to the contrary.

Since this is the first appeal, it is necessary for this court, acting in its appellate jurisdiction, to look at the evidence afresh, analyse it and come to its own conclusions independent of the trial court’s findings; it is only after this exercise that this court can reach an informed decision on whether the learned magistrate’s decision can be upheld or should be disturbed.

In **Kiruga v Kiruga & Another [1988] KLR 348**, the Court of Appeal observed that:-

***“An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.”***

In her evidence, **Josephine Mukami Maina** who described herself as one of the directors of the 1<sup>st</sup> respondent company testified that she saw an advertisement in a local daily newspaper to the effect that the suit property was going to be sold at Mukuyu. She bid to buy the property at Kshs. 300,000/= . Since she was the successful bidder, she entered into a contract with the appellant’s agent, the auctioneer, and paid the deposit of the purchase price. The witness admitted that though, according to the contract between them, the balance was to be paid within thirty days after the sale, it was not paid within that period and that it was only on 20<sup>th</sup> November, 2008 that the 1<sup>st</sup> respondent company wrote a letter to the appellant asking for more time to clear the balance.

The witness told the court that when she went to pay the balance of Kshs. 225,000/= on 28<sup>th</sup> November, 2008 the same was rejected and instead she was given a letter asking the company to bid for the property afresh. She asked the court to allow her to pay the balance of the purchase price and have the transfer of the property into her name effected.

In cross-examination, the witness admitted that she did not have any letter showing that she was given an extension of time to pay the balance. She also admitted that at the time of filing of the suit, she knew that the suit property had been sold. In answer to a question from the 2<sup>nd</sup> respondent the witness testified that she bid for the property on 20<sup>th</sup> November, 2007 and at the time the property was advertised for sale the second time she had not paid the full purchase price.

Alloys Maina Warui who attended the auction on behalf of the 1<sup>st</sup> respondent company testified that he paid a deposit of Kshs. 75,000/= for the suit property on 27<sup>th</sup> November, 2007 and that he understood the balance due was payable within thirty days of the date of auction failure of which the deposit was going to be forfeited; indeed when he went back to the appellant on 20<sup>th</sup> November, 2008 he was told that the deposit had been forfeited. The witness applied for an extension but he never got any letter extending the period for payment of the balance of the purchase price. The witness testified that he understood time to have been of essence and there was no clause for extension of time in the agreement. He also admitted that the sale could only have been complete upon payment of the full purchase price and that he was also aware that it was not the appellant's obligation to issue him with any notice of the subsequent auction of the property, the initial one having fallen through.

The appellant's representative Esther Penina Nyakiango testified that the suit property was offered as security for a loan from the appellant way back in 1973; since the chargors defaulted in payment of the loan, the property was advertised for sale apparently in exercise of the appellant's statutory power of sale. The witness agreed that the 1<sup>st</sup> respondent was declared the highest bidder and paid Kshs. 75,000/= but failed to pay the balance within the agreed thirty day period. Consequently, the deposit was forfeited and the property re-advertised for sale. The witness also confirmed that the appellant also received a letter from the first respondent seeking for an extension of the payment period but no extension was given. She said that the property was sold to the 2<sup>nd</sup> respondent who bought it for Kshs. 400,000/=; a memorandum of sale and the receipts showing that the 2<sup>nd</sup> respondent had fully paid for the property were produced and admitted in evidence.

The 2<sup>nd</sup> respondent himself testified that indeed he participated in the auction of 14<sup>th</sup> November, 2008 and bid to purchase the property at Kshs. 400,000/=. He produced the agreement which he entered into with the appellant for the purchase of the property.

From the evidence adduced by parties it is apparent that some of the issues the trial court ought to have considered as pertinent to the determination of the suit were uncontested; it is apparent, for instance, that parties were in agreement that:-

1. There was an advertisement for sale by auction of the property known as **Loc. Maragi/1193/60** on 20<sup>th</sup> December, 2007 at Nyeri town;
2. The appellant and the 1<sup>st</sup> respondent were bound by a sale agreement whose terms and conditions were, *inter alia*, that:-
  - a) The highest bidder was to be declared the purchaser;
  - b) Immediately after the sale, the purchaser was to pay twenty five per cent ( 25%) and thereafter sign a standard form agreement;
  - c) The balance of the purchase price was to be paid to the chargee, Industrial & Commercial Development Corporation at their offices within 30 days of the date of sale,

time being of essence;

d) The chargee reserved the right to extend completion date where necessary but subject to the purchaser meeting the extra costs and interest thereby occasioned.

e) The sale contract could only be deemed absolute upon payment of the balance of the purchase price;

f) If the purchaser defaulted in payment of the purchase price within 30 days from the date of the sale, the deposit paid by the purchaser was to be forfeited to the chargee absolutely and the chargee could without notice to the purchaser, resell the property at such time, in such manner and subject to such conditions as it thought fit.

3. The 1<sup>st</sup> respondent did not pay the balance of the purchase price within the 30 days period;

4. The 1<sup>st</sup> respondent's deposit was forfeited.

If one considers carefully the conditions of sale in the contract between the appellant and the 1<sup>st</sup> respondent, he is bound to conclude that it is unnecessary to look any further than what the agreement provided to find an answer to the dispute between the contracting parties; in my humble view, the contract was what one may describe as self-contained in the sense that it is unnecessary to look for extrinsic evidence to interpret the intentions of the parties in the event any of breach of the conditions attached to the sale.

These conditions of sale are, in my view, fundamental since they go to the root of the contract and a breach of any of them would result to a fundamental breach whose effect would release the innocent party from the obligations of the contract or, to put it more appropriately, to rescind the contract. (See the case of *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at 397). And where a contract has been so rescinded *de futuro*, it has been said that all the primary obligations of the parties under the contract which have not yet been performed will terminate.

One of the essential elements of a valid contract is consideration and there is no doubt that, without it there can be no valid contract; it is an essential element of a valid contract failure of which there would be no enforceable contract. It follows that when one party fails to perform his obligations in respect of payment of consideration the contract fails too.

There is evidence and indeed there is no dispute that the 1<sup>st</sup> respondent failed to pay the full purchase price within the prescribed period. This failure of consideration was in breach of the contract between it and the appellant and since there can be no valid contract without consideration, the breach was fundamental. In the face of this breach, the appellant was no longer bound by the contract; it had the option of walking out of it and for avoidance of doubt the contract itself was clear that:-

***“If the purchaser fails to pay the balance of the purchase price within 30 days from the date of the sale, the deposit paid by the purchaser shall be forfeited to the chargee absolutely and the chargee may without notice to the purchaser re-sell the property at such time, in such manner and subject to such conditions as it shall think fit.”***

The clear provisions of the contract notwithstanding, the effect of the 1<sup>st</sup> respondent's breach of the contract was that the contract was unenforceable because, as noted, it had failed for consideration; indeed if any party was to take an action on the contract in the face of the 1<sup>st</sup> respondent's breach, then it was the appellant and all it would be seeking for in such an action would be damages it may have suffered as a result of the 1<sup>st</sup> respondent's breach. I find that the learned magistrate fell into error when he effectively held that there was an enforceable contract between the appellant and the 1<sup>st</sup> respondent and which the 1<sup>st</sup> respondent could enforce against the appellant.

The 1<sup>st</sup> appellant's counsel urged that there was extension of time for completion. The contract itself expressly provided that the chargee reserved the right to extend the completion date where necessary but subject to the purchaser meeting extra costs and interest thereby occasioned. There was no evidence, however, that the appellant exercised this option in favour of the 1<sup>st</sup> respondent. It is curious to note that although the auction was held on 20<sup>th</sup> December, 2007 and it ought to have been completed within 30 days of that date, it is only on 20<sup>th</sup> November, 2008, a year later that the 1<sup>st</sup> respondent wrote to the appellant asking for more time to pay the balance of the purchase price.

The 1<sup>st</sup> respondent appeared to argue that in response to the request for extension of time, the appellant agreed orally or made representations that suggested that the completion period had been extended. I am unable to see any indication of such representations that would have led the 1<sup>st</sup> respondent to believe that the completion period had been extended.

It is also important to remember that the parties were bound by a written agreement and under the parole evidence rule the 1<sup>st</sup> respondent could not make any reference to anything outside the agreement to vary the agreed terms. According to this rule where the intention of the parties has in been reduced to writing, it is generally not permissible to adduce extrinsic evidence, whether oral or written, either to show that intention, or to contradict, vary or add to the terms of the document, including implied terms. (See *Burges v Wickham (1863) 3 B & S 669 at 696-697* per Blackburn J).

One other question that deserves attention is whether the remedy of specific performance was available to the 1<sup>st</sup> respondent? Assuming that the contract in question was enforceable against the appellant, it was important for the subordinate court to consider that from the very beginning the ground on which a court of equity would interfere to enforce specific performance of a contract was the inadequacy of the remedy at common law, which was by payment of a sum of money as damages; it therefore follows that the court does not so interfere in cases where a money payment affords an adequate remedy. (*See Anders Utkilens Rederi A/S v O/Y Lovisa Stevedoring Co A/B, The Golfstrøm [1985] 2 All ER 669 at 673 per Goulding J*). There was no evidence by the 1<sup>st</sup> respondent, that even assuming its claim against the appellant was viable, damages were not an adequate remedy.

The second aspect of this remedy as far as the 1<sup>st</sup> respondent's claim is concerned is whether in view of the 1<sup>st</sup> respondent's breach of contract this remedy was available to it. In my humble view, I would say that having breached the fundamental conditions of the contract and thus, with its hands soiled, the 1<sup>st</sup> respondent was not entitled to any equitable remedy let alone the remedy of specific performance. I would, in this regard, adopt the words of the learned judges of the Court of Appeal in **Civil Appeal No.165 of 1996, Gurdev Singh Birdi and Marinder Singh Ghatora and Abubakar Madhubuti**. Gicheru JA (as he then was) expressed himself thus;

*“When the appellants sought the relief of specific performance of sale of the respondent's property...they must have been prepared to demonstrate that they had performed or were ready and willing to perform all the terms of the agreement...which ought to have been performed by them and indeed that they had not acted in contravention of the essential terms of the said agreement...It was never in dispute that the appellants were in breach of an essential term of the agreement in that they failed to deliver up to the respondent the balance of the purchase price of the suit property...as stipulated in the agreement. There was, however, no express stipulation nor any indication in the agreement that time was of the essence of the agreement. The appellant's failure to deliver up the balance of the purchase price of the suit property by the appointed date...did not bring the agreement to an end...It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed...a plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action. However, this rule only applies to terms which are essential and considerable. The*

*court does not bar a claim on the ground that the plaintiff has failed in literal performance, or is in default in some non-essential or unimportant term, although in such cases it may grant compensation...Where a condition or essential term ought to have been performed by the plaintiff at the date of the writ, the court does not accept his undertaking to perform in lieu of performance, but dismisses the claim...The moment the plaintiff went into equity, and asked for specific performance, and it was proved that he himself was guilty of the breach of contract.....the court of equity would refuse to grant specific performance and would leave the parties to their other rights...When the appellants came to court seeking the relief of specific performance of the agreement, they had not performed their one essential part of the agreement. Namely: payment of the balance of the purchase price of the suit property. Indeed, right up to the conclusion of the proceedings in the superior court, they had not done so. In these circumstances, no court of equity properly directing its mind to the same would have considered it just and equitable to grant them the equitable relief of specific performance of the agreement with a view to doing more perfect and complete justice”.*

On his part Tunoi, JA (as he then was) said:

*“However, the appellants’ conduct has been such as to render it inequitable for specific performance to be granted...There was no evidence that prior to the filing of the suit the applicants tendered the balance of the purchase price to the respondent. This only confirms that they were never ready, able and willing to carry out their part of the contract. Secondly, the appellants simply could not raise the balance of the purchase price on or before the specified time and were in fact in breach of the agreement. Thirdly, the nature of the property and the surrounding circumstances make it inequitable to grant the relief of specific performance. The contract not having been completed within the period fixed for completion, it would be oppressive, unjust and financially injurious to require the respondent, who has not been guilty of laches nor inordinate delay, to part with his property, more than four years after the event when its current value has materially appreciated”.*

The learned judges pronouncements are directly relevant to this case; just as it was in the case in which the pronouncements were made, it was evident in case at hand that the first respondent had not only breached the contract but it did not demonstrate that it was ready and willing to perform its part of the bargain until almost a year later after the completion date when, surprisingly, it asked for more time to complete the sale. A delay of almost a year after the due date before the 1<sup>st</sup> respondent popped up to ask for more time to complete the sale cannot, by any stretch of imagination, be interpreted to mean that it was ready and willing to complete the sale.

I have noted that the Court of Appeal (Gicheru, J) was clear that failure to deliver up the purchase price did not in itself bring the contract to an end; however, the learned judge so held apparently because time was not of essence. In the contract between the appellant and the 1<sup>st</sup> respondent, time was expressly indicated to be of essence. The judges were clear that before the plaintiff goes to the court of equity he must demonstrate that he has performed all the terms of the contract; they held that the plaintiff had gone to that court but just as in this case, was guilty of breach of contract. They came to the conclusion that he was not entitled to the equitable relief of specific performance. It is for the same reason that the learned magistrate ought to have dismissed the 1<sup>st</sup> respondent’s claim.

Finally, it was urged on behalf of the 1<sup>st</sup> respondent that the property that was subsequently advertised for sale long after the 1<sup>st</sup> respondent had failed to complete the sale was not the same property he bid for in the auction of 20<sup>th</sup> December, 2007. This argument was based on the evidence that the property in the subsequent auction was described in the advertisement for auction as Loc. **Maragi/1193/60 (Makuyu market)** instead of **Loc. Maragi/1193/60 (Mukuyu Market)**.

As long as the registration or the title of the property was not at variance in the two advertisements, reference to “Makuyu” rather than “Mukuyu” is to me *de minimis non curat lex*; the law does not concern itself with trivialities. In any event, when the 1<sup>st</sup> respondent failed to perform its part of the bargain under

the contract and the appellant was thereby discharged from any obligations by which it was hitherto bound, its dealings with the property, howsoever, is a question that should have least bothered the 1<sup>st</sup> respondent. In the absence of any valid agreement between it and the appellant over the suit property, the 1<sup>st</sup> respondent had no business in the manner the appellant disposed its property.

For the forgoing reasons I would allow the appellants' appeals and set aside the learned magistrate's judgement. I would substitute his judgment with the order dismissing the plaintiffs' suit and allowing the 2<sup>nd</sup> respondent's counter-claim with costs to the appellants both in this appeal and in the magistrates' court.

**Signed, dated and delivered in open court this 24<sup>th</sup> day of April, 2015**

Ngaah Jairus

**JUDGE**